UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs

Case No. 10-20403
HONORABLE NANCY G. EDMUNDS

BERNARD N. KILPATRICK,

Defendant.
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DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO SENTENCING MEMORANDUM

Defense counsel has argued that the June 2005 tender of $100,000 by Karl Kado to Defendant should not be attributable to him as income. In its *Response to Defendant Bernard Kilpatrick's Sentencing Memorandum,* the Government attempts to take undersigned counsel to task for this objection because it is inconsistent with a statement he made in closing argument about that tender being a payment on a balance owing. In its words, the Government claims that counsel's present objection "whipsaw[s] the jury and this Court." The Government's attack on counsel is misplaced.

Context is important here. Recall that the Government, from the beginning, claimed that Bernard Kilpatrick was not a real consultant. Instead, according to the Government's theory, Mr. Kilpatrick's clients were victims and their payments to him were "extorted." Mr. Kado specifically was described from the opening of trial as one of Bernard Kilpatrick's extortion victims. *(TR. 9/21/12, Opening Statement, p 41.)* To this day this remains the Government's position. *(Government's Sentencing Memorandum, pp 11-12; Response to*

Defendant's Sentencing Memorandum, p 4.) Likewise from the beginning, the defense was that Bernard Kilpatrick ran a legitimate business, that Mr.Kado was a legitimate client, and that his payments were for services legitimately rendered.

Consider next Mr. Kado's testimony, quoted at length in Defendant's sentencing memorandum, that the $100,000 was for the election. Consider also his further direct examination testimony that the $100,000 tender was "the last time you see me, I'm out...I am tired of this scenario ...." *(TR. 12/3/12, p. 43.)* Cross-examination on the $100,000, including the passage quoted by the Government in its *Response*, *p. 3*, was to try and demonstrate that there was another reason why Mr. Kado might be approaching BK with this money--he owed Bernard Kilpatrick for prior services, or at least Mr. Kipatrick had that belief. This, along with Mr. Kado's acknowledgment that it was his idea to come forward with the money--"out of the blue--rebutted the implication that he tendered the money in order to get out of an extortionate relationship.

With this context in mind, the fact that Bernard Kipatrick believed that Kado was in arrears to him, but that Kado paid the money for use in the election, are not inconsistent. Both may be true, and in fact probably were true. The fact that counsel mistakenly argued in closing argument that Kado's payment was on a balance owing rather than for the election was a mistake (acknowledged already in Defendant's sentencing memorandum), not a "whipsaw." Frankly, counsel probably did his client a disservice by not pointing out to the jury that the payment was not for Bernard Kilpatrick at all, but rather for the mayor. That argument, combined with Mr. Kado's testimony that he tendered the money as his own idea, even more clearly distanced Mr. Kilpatrick from the Government's claim that he was extorting money for his own account.

Finally, consider that the Government's theory regarding Bernard Kilpatrick's 2005 tax liability had nothing to do with this $100,000, in testimony or in closing argument. In testimony, S.A. Schuch explained that the Government's claim rested on the $180,000 of unreported deferred compensation funds, which funds were totally unrelated to any RICO or extortion allegations against Defendant. In closing, the Government did not address the matter at all. Had the Government argued that Mr. Kado's $100,000 should be considered by the jury as an additional "specific item" of unreported income attributable to Defendant in 2005, counsel might have focused more in his own closing argument on the nuance for whose benefit the money was tendered.

The Government's own exhibit, COBO-16, and Mr. Kado's repeated testimony at trial, demonstrate that he tendered the $100,000 for Kwame Kilpatrick's re-election campaign. Defense counsel's mistaken argument in closing as to why that payment was not extortionate (as a payment on account rather than as an unanticipated tender for someone else's benefit entirely, either of which would be a defense), does not change this fact. The money in fact was not a payment on account, and therefore should not be deemed income to Defendant.

The balance of the Government's *Response* is a re-hash of old arguments about Defendant supposedly extorting other persons. Undersigned counsel responded already to those arguments in his previously filed sentencing memorandum, and belaboring it here is unnecessary. Suffice it to say that the jury did not agree with the Government, almost certainly because the cross-examination testimony of the witnesses upon whom the Government relies, and the defense exhibits offered in connection with that testimony, put the lie to thses claims. The Court similarly should reject the Government's arguments.

Defendant asks that the Court find his sentencing guideline range to be 15-21 months, grant a variance from that guideline range, and sentence him as requested in *Defendant's Sentencing Memorandum*.

Respectfully submitted,

Dated: October 16, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 16, 2013, he electronically filed *Defendant's Reply to Government's Response to Sentencing Memorandum*. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

Dated: October 16, 2013

s/John A. Shea

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